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No. 88-126

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

OLIVER MARSHALL et al.,

Petitioners,

v.

WESTERN GRAIN COMPANY, INC., AND RIVERSIDE GROUP, INC.,

Respondents.

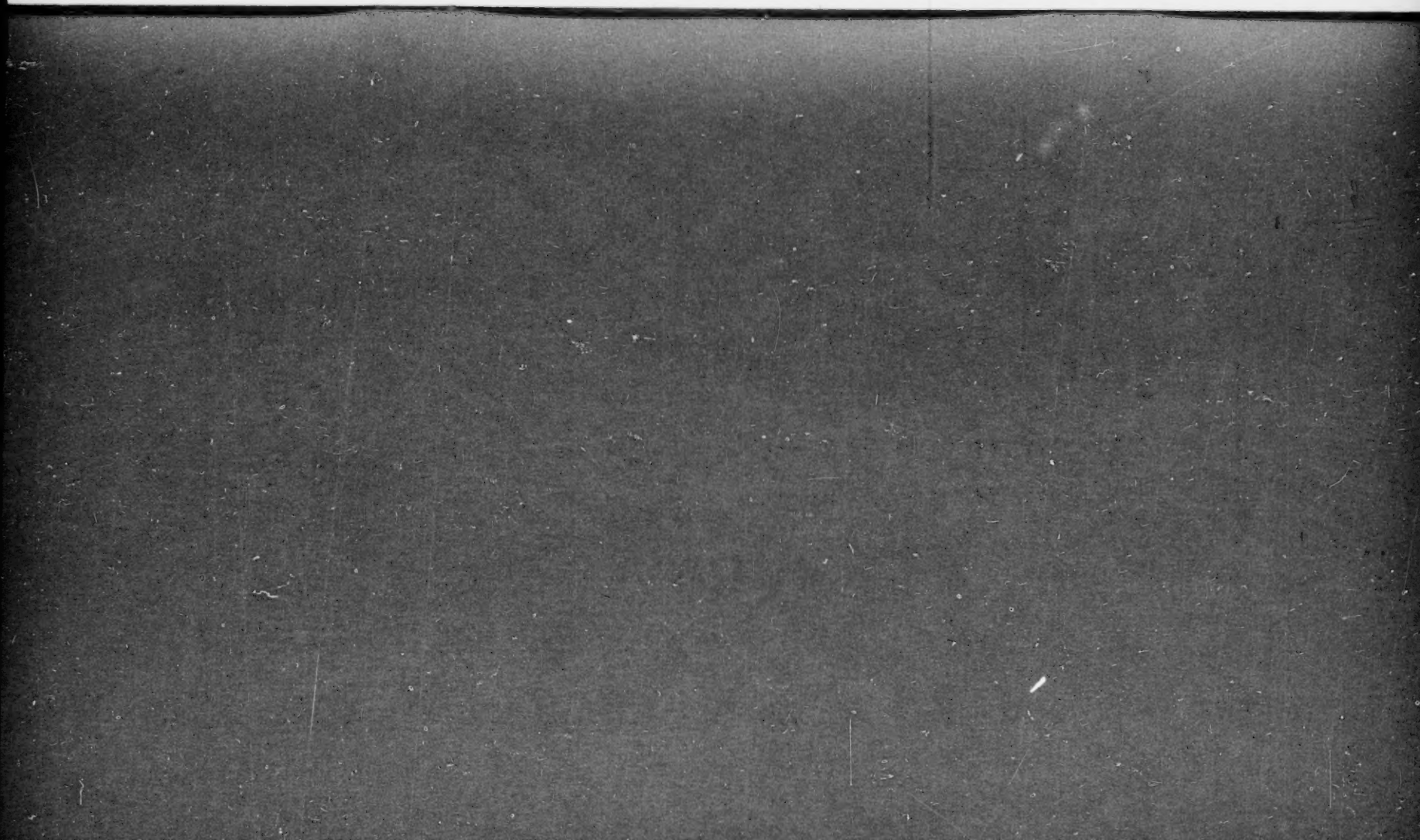
On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

DAVID J. MIDDLEBROOKS*
KIM E. ROSENFIELD
R. DAVID PROCTOR
Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky, P.C.
2222 Arlington Avenue South
Post Office Box 55727
Birmingham, Alabama 35255
205/933-7111
Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



QUESTIONS PRESENTED

Respondents object to Petitioners' questions presented for review since the questions are argumentative. The sole question presented by the Petition is:

1. Whether The Court Below Was Correct In Ruling That An Employer Does Not Violate Title VII When It Fails To Pay Severance Benefits Directly To Members Of A Bargaining Unit When Such Payment Would Violate The National Labor Relations Act And When There Is No Allegation By The Title VII Plaintiffs That The Collective Bargaining Agreement Is Discriminatory On Its Face Or In Its Administration.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE*

Petitioners' statement of the case is incomplete, and like the entire Petition, misleading. This statement of the case is not intended to summarize completely the proceedings below, but rather to point out the most significant misstatements and omissions of the Petitioners.

*Affiliated parties
Wilson Financial Corporation
The Atlantic Group, Inc.

I. The Proceedings.

This action was filed by forty-six former bargaining unit employees of Western Grain Company, Inc.[1] (hereinafter "Western Grain") pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* All Petitioners were represented by the United States Steelworkers of America in a collective bargaining relationship between Western Grain and the union. Petitioners' Amended Complaint in this action sought recovery under three separate counts. Count One alleged that Western Grain violated Title VII by failing to make severance payments upon plant closure to the Petitioners due to their race. *See* Petitioners' Amended Complaint at Paragraphs 8-17. Count Two, according to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit"),[2] alleged that Western Grain violated Title VII by refusing to hire certain minority employees into non-bargaining unit jobs. *Id.* at Paragraphs 18-25. Count Three alleged that Western Grain violated the Equal Pay Act

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[1] Riverside Group, Inc., also a Respondent in this case, became the sole shareholder of Western Grain. Petitioners allege that Riverside is a successor corporation, an assertion Respondents have not admitted and specifically deny. Respondents concede this issue for purposes of this review only because this is a review of a ruling on a Rule 12(b)(6) motion. Since Western Grain was the employer of Petitioners at all relevant times, and for purposes of clarity, the term "Western Grain" will be used in discussing the Company in this brief.

[2] The decision below is reported in *Marshall v. Western Grain Co.*, 838 F.2d 1165 (11th Cir. 1988). The opinion is reproduced at pages A-1 to A-13 of the appendix accompanying the Petition for Writ of Certiorari. Citations to the opinion below will, for purposes of convenience, refer to the appendix to the Petition. The Eleventh Circuit's ruling on Count Two is located at A-12 to A-13 of the Petition.

of 1963, 29 U.S.C. § 2206 *et seq.* *Id.* at Paragraph 26. Following the trial court's dismissal of Petitioners' entire Amended Complaint pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, Record at 13, Petitioners appealed to the Eleventh Circuit. The Eleventh Circuit, in a unanimous per curiam opinion, affirmed the district court's rulings that Counts One and Three failed to state a claim, but reversed the dismissal of Count Two and remanded that portion of the case for further proceedings in the trial court.[3] *See* Petition at A-13.

The Petitioners' questions presented make clear that the only holding of the court below challenged in this Court is that which relates to severance pay. *See* Petition for Writ of Certiorari at i (hereinafter "Petition at —"). In ruling that Petitioners failed to state a claim relating to the denial of severance pay to them, the Eleventh Circuit narrowly held that when there are no allegations that the agreement itself is discriminatory or administered in a discriminatory fashion, a bargaining unit of mostly minority employees cannot challenge under Title VII the employer's failure to provide unilaterally severance pay benefits if doing so would violate the NLRA. Petition at A-9 to 12; *see* 29 U.S.C. § 158(a)(5). This narrow holding of the court below, limited as it is, stands in stark contrast to the Petitioners' mischaracterization of the Eleventh Circuit's ruling. *See* Petition at 3-4. Petitioner's Motion for Rehearing and Suggestion of Rehearing *En Banc* was unanimously denied by the court below. Petition at A-16.

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[3] This fact is omitted from the Petitioners' statement of the case.

II. The Facts.

Since the Petitioners' claim was dismissed pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6), this Court, as the Eleventh Circuit did, must assume that all factual allegations in the Petitioners' Amended Complaint are true. The allegations contained in the Petitioners' Amended Complaint, if proven, would establish the following: Western Grain was doing business at a plant in Birmingham, Alabama in December 1983. At that time, the company began laying off employees of that plant for the purpose of closing it. Petitioners' Amended Complaint at Paragraph 8.

A bargaining unit of some sixty-eight employees was represented by a union. Of these employees, approximately sixty-seven were black. In contrast, of the total number of non-bargaining unit employees[4], four were black. Petitioners' Amended Complaint at Paragraphs 9-10.

In laying off employees at the plant, Western Grain granted severance pay to the non-bargaining unit employees but not to members of the bargaining unit. Petitioners' Amended Complaint at Paragraph 11. Petitioners allege

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[4] As noted by the court below, Petition at A-15 n. 5, the terms "union" and "bargaining unit" do not have identical meanings. Union members are those employees who have actually joined the union while the term bargaining unit members includes this group and all other employees covered by the collective bargaining agreement. Some confusion is potentially created by the Petition's use of these words interchangeably. The better course in discussing this issue would be in all situations to use the term "bargaining unit" in referring to the group of employees covered by the collective bargaining unit, since this broader term encompasses all those covered by the agreement between the company and the union.

that the company's decision not to grant severance pay to the bargaining unit personnel was motivated by race. Petitioners' Amended Complaint at Paragraph 14. In the Petition, as well as the Amended Complaint, the Petitioners are challenging only Western Grain's decision not to grant severance pay to them. *See* Petition at 5-6; Petitioners' Amended Complaint at Paragraphs 11-14.

SUMMARY OF ARGUMENT

Petitioners' unsupported assertion that the court of appeals' decision "radically departed" from established principles of law is completely misplaced. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), along with the decisions of this Court and the lower federal courts, require an employer to bargain with the bargaining union representative before bestowing severance pay benefits on bargaining unit personnel. Here. Petitioners claim that because of their race Western Grain failed to bestow unilaterally upon them severance benefits paid to non-bargaining unit employees. However, their argument fails to take account of the fact that a mandate of Congress, in the form of Section 8(a)(5) of the National Labor Relations Act, prohibits such a unilateral payment. Thus, the court below correctly held that when there is no allegation that a union contract is discriminatory on its face or in its administration, a Title VII plaintiff fails to state a claim when he alleges a violation premised solely on a unionized employer's failure to grant unilaterally severance pay to bargaining unit personnel.

In addition, the decision below is completely consistent with the only case even factually close to it. *See Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973). There the court held that an employer cannot be charged with a violation of Title VII based upon its refusal to take actions which violate a nondiscriminatory collective bargaining agreement. *Rose*, 487 F.2d at 810.

The holding of the court below was particularly narrow and will not, as Petitioners claim, destroy Title VII's remedial application to a "broad sector of the labor force." The decision will bar only those claims that are on their face inconsistent with Congress' mandate than an employer may not, for any reason whatsoever, unilaterally grant benefits to bargaining unit personnel. *See* 29 U.S.C. § 158 (a)(5). Thus, the ruling will affect only an exceedingly small number of workers.

Finally, the decisions of the other courts of appeal represented by Petitioners to be in conflict with the decision below are inapposite. Those decisions are neither factually similar to this case nor inconsistent with the Eleventh Circuit's ruling.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Decision Below Is Not A Departure From Existing Principles Regarding The Accommodation Of Title VII And The National Labor Relations Act.

The Eleventh Circuit's decision reflects a well-reasoned accommodation of Title VII and the National Labor Re-

lations Act (NLRA), two statutes that inevitably overlap in the area of labor relations. *See* Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB,* 123 U. PENN. L. REV. 158 (1974). The court's narrow ruling held that, under these facts and circumstances, an employee fails to state a claim for relief under Title VII when he seeks to characterize as an unfair employment practice an employer's failure to take action expressly made unlawful by Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5).

In a singularly curious argument, the Petitioners attempt to characterize the Eleventh Circuit's decision below as a departure from existing legal principles by analogizing this case to the Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728 (1981). Those decisions are completely inapposite to the instant case. Both opinions dealt with the effect to be given a previous arbitration decision, rendered pursuant to a contract, in a subsequent lawsuit filed under a remedial statute. In *Gardner-Denver*, this Court held "that the federal labor policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." *Gardner-Denver*, 415 U.S. at 46 n.6. Likewise, in *Barrentine*, this Court ruled that an arbitral decision does not preclude a subsequent lawsuit alleging violations of the Fair Labor Standards Act. *Barrentine*, 450 U.S. at 737, 743-45.

Furthermore, nothing in the Eleventh Circuit's opinion in any way departs from this Court's holdings in *Gardner-Denver* and *Barrentine*. The decision below was

limited to the narrow holding that when there is no allegation that a collective bargaining agreement is discriminatory on its face or in it administration, a Title VII plaintiff fails to state a claim when he alleges a violation premised solely on a unionized employer's failure unilaterally to grant severance pay to bargaining unit employees.[5] The *Gardner-Denver* and *Barrentine* decisions do not even come close to addressing any issue in this litigation relating to the appropriate treatment of Title VII and the NLRA under these facts and circumstances.

In addition, Petitioners' brief evidences a failure to account for a basic premise of labor relations law. Petitioners argue that the Eleventh Circuit should have allowed them the opportunity to show that racial discrimination motivated Western Grain's decision not to grant severance pay to them. The crucial point missed by Petitioners, however, is that Western Grain's motive was in effect controlled by a legal reality: it would have been a violation of the NLRA for Western Grain to have unilaterally granted such benefits, or even have discussed them with the Petitioners, without bargaining with the Petitioners' duly chosen bargaining unit representative. 29 U.S.C. § 158(a)(5); *see, e.g., First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n. 15, 681-82 (1981) (there is no doubt that an employer is under a duty to bargain about the results of effects of its decision to stop work including severance payments to bargaining unit members);

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[5] Petitioners' assertion that the ruling below will affect a broad sector of the labor force simply ignores the narrowness of the Eleventh Circuit's holding. As is demonstrated in Section II, *infra*, their contention is baseless.

Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1085 (1st Cir. 1981) (employer required to bargain about effects of going out of business such as severance pay); 1 C. Morris, *The Developing Labor Law,* at 773-74 (2d ed. 1983) (hereinafter *"Developing Labor Law"*) (citing *NLRB v. Adams Dairy, Inc.,* 322 F.2d 553, 562-63 (8th Cir. 1963), *vacated,* 379 U.S. 644 (1965), *on remand,* 350 F.2d 108, 115 (8th Cir. 1965) (readopting earlier ruling regarding severance pay), *cert. denied,* 382 U.S. 1011 (1966)). The point is well stated by Professor Robert A. Gorman in his respected treatise in this area:

> It is also well settled that regardless of whether the employer is obligated to bargain about such major decisions as going out of business . . . , it must bargain about the effects or impact of those decisions, such as severance pay or transfer to other company jobs or locations. Severance pay is thus a mandatory subject [of bargaining]. . . .

R. Gorman, *Labor Law* at 499 (1976) (hereinafter *Gorman*).[6]

Western Grain could only have granted the relief Petitioners seek in their Amended Complaint (i.e., a unilateral grant of severance pay) by violating Section 158 (a)(5). The fact that the collective bargaining agreement itself did not specifically address the award of

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[6] This Court has previously recognized that the NLRA proscribes the employer from negotiating directly with individual employees. *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678 (1944); *see generally Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975) (policy of enforcing collective bargaining precludes direct bargaining by employer with minority bargaining unit members, as opposed to elected union representative).

severance pay in a plant closing situation is irrelevant.[7] The duty imposed on Western Grain to refrain from unilateral bargaining and the unilateral bestowal of benefits finds its genesis in statutory law and not in contract. *See* 29 U.S.C. § 158(a)(5); *First National Maintenance Corp.*, 452 U.S. at 677 n. 15, 681-82; *Soule Glass and Glazing Co.*, 652 F.2d at 1085; *Developing Labor Law, supra,* at 773-74; *Gorman, supra,* at 499. Even if the collective bargaining agreement had expired, Western Grain was generally obligated to maintain the status quo and thus abide by the contract's terms with the union unless agreement was reached otherwise. *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985), *aff'd*, 108 S.Ct. 830 (1988). In affirming, this Court directly quoted the pertinent passage of the Ninth Circuit's opinion. *See Laborers Trust Fund*, 108 S.Ct. at 836 n. 16.

Since the decision of whether to grant such benefits is necessarily a fundamental component of the "effects" a plant closing will have, and since effects bargaining is mandatory when a plant closing decision is made, it

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[7] The court below was, however, no doubt impressed by the fact that the collective bargaining agreement provided for severance benefits for bargaining unit employees in certain other situations. The agreement did not, however, call for such payment upon plant closing. Therefore, this was a mandatory subject of bargaining relating to the effects of the plant closure. *See e.g., Gorman, supra,* at 499. As such, it was incumbent upon Western Grain to respond to a request to bargain by the union, if made, and to bargain in good faith about this and other subjects that were pertinent to the effects of the company's decision to close the plant. Petitioners made no allegation that the union requested such bargaining or that Western Grain refused to bargain on the subject of severance pay.

follows that a company is required to give the duly chosen bargaining agent notice and an opportunity to bargain before bestowing severance pay benefits to employees represented by a union.[8] *First National Maintenance Corp.*, 452 U.S. at 677 n. 15, 681-82; *Soule Glass and Glazing Co.*, 652 F.2d at 1085; *Developing Labor Law, supra,* at 773-74; *Gorman, supra,* at 499. At the base of the Eleventh Circuit's decision was its common sense realization that where there is no allegation that the collective bargaining agreement is discriminatory on its face or in its administration, Western Grain cannot be held liable under Title VII for abstaining from conduct prohibited as unlawful by section 158(a)(5) and the decisions of this Court.[9] Notwithstanding Western Grain's reasons for not unilaterally bestowing

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[8] Petitioners' failure to appreciate basic labor relations law principles is evident with respect to another point. They imply in footnote 1 of their Petition that the company engaged in race discrimination in the formation of the bargaining unit and that this in some way resulted in the particular composition of the unit. First, it is important to note that this argument was not even raised until the Petitioners moved for rehearing of the Eleventh Circuit's decision. *See* Petitioners' Petition for Rehearing and Suggestion for Rehearing en banc at 3 n.1. More importantly, however, pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. § 159, it is the National Labor Relations Board that possesses the final authority to "decide in each case" whether the unit is appropriate for purposes of collective bargaining when a bargaining unit is certified. *See* 29 U.S.C. § 159(b). Thus, any claim of Petitioners of race discrimination in relation to the composition of the bargaining unit should be directed against the Board.

[9] The court below also underscored "the federal policy of judicial nonintervention in the collective bargaining process." Petition at A-10. This nonintervention is crucial to reinforce management and labor's respective confidences in the collective bargaining process, and this applies here where there is no allegation that the collective bargaining contract is discriminatory on its face or in its application. Petition at A-11.

severance pay, it would have been illegal for it to have done so.[10] Accordingly, even if race played a role in the decision, which it did not, Petitioners still are not entitled to the relief they seek, because Western Grain was legally compelled to adopt this course of action.[11]

Petitioners' representation to this Court that the decision below departs from existing decisional law regarding Title VII and the NLRA is erroneous for another reason. Not only are Petitioners unable to point to a single case that conflicts in any way with the decision below, they also fail to address the one case relied upon by the Eleventh Circuit which is indeed factually similar. *See Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973).

In *Rose*, the plaintiff claimed that her company's reason for not reinstating her on a certain date after sick leave was her gender. The collective bargaining agreement in *Rose*, as in this case, was not alleged to be discriminatory on its face or in its application. In holding that the plaintiff "ha[d] made no Title VII claim relating to the general failure of the Company to reinstate her . . . ," the court stated as follows:

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[10] Petitioners characterize the decision below as "judicial legislating at its worst." However, a basic point of labor relations law which they ignore in their analysis of this area, easily answers this misplaced characterization. The "legislation" that prevents them from being able to state a claim in this litigation is not judicial but rather congressional in nature in the form of Section 158(a)(5).

[11] Petitioners, in an attempt to "save" their claim, introduce a new argument before this Court. They assert at page 14 of their Petition that Western Grain never attempted to make any "offer" to the union. There is absolutely nothing in the record before this Court to support this newly advanced assertion.

> The Company would have violated the collective bargaining agreement had it given Rose a job on October 30, and it would have done so at the expense of another employee. If what the Company did was required by the contract, and if the contract itself is not discriminatory, the Company could not have discriminated against Rose no matter what its subjective motivation.

Rose, 487 F.2d at 810. Although a portion of the *Rose* court's decision, not relevant here, deferred to the arbitrator's decision and thus has been since invalidated by a subsequent decision of this Court, *see Gardner-Denver*, 415 U.S. at 46 n.6, the above-quoted rule of law remains intact and applicable here. In *Rose*, the company was prohibited from taking a certain employment action (i.e., reinstating an employee) because of limitations imposed on it by a collective bargaining agreement and basic principles of labor relations law. Likewise, Western Grain is also prohibited from taking a certain employment action (i.e., granting a severance pay) because of limitations imposed on it by Section 158(a)(5). In both cases the result is the same: the Petitioners are precluded from stating a claim under Title VII.[12]

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[12] It is noteworthy that Justice Stevens, in his role then as a member of the Seventh Circuit Court of Appeals, filed a separate opinion explicitly joining in the majority's analysis of this issue. Justice Stevens indicated that he would have affirmed the summary judgment granted to the employer in all respects. *Rose*, 487 F.2d at 813-14 (Stevens, J., dissenting in part).

II. The Eleventh Circuit's Decision Below Will Not Preclude Members of Bargaining Units Who Are Truly Victims of Racial Discrimination From Being Able To State A Claim Under Title VII For Unfair Employment Actions That Are Actionable Under That Statute.

Petitioners erroneously suggest that the decision below will destroy Title VII's remedial application to a "broad sector of the labor force." First, an honest reading of the decision below demonstrates the narrowness of the Eleventh Circuit's holding: an employer does not violate Title VII when it refuses to grant unilaterally severance pay benefits to bargaining unit members covered by the NLRA while giving such benefits to non-bargaining unit employees. Petitioners do not allege that the collective bargaining agreement between Western Grain and the union was discriminatory on its face, in its negotiation, or in its administration. Petition at 5-6.

At pages 14-15 of their Petition, the Petitioners completely mischaracterize the court of appeals ruling. It is not that there is no set of facts that would support a claim of racial discrimination as between white non-bagaining unit employees and black employees represented by a union. Obviously, if a black bargaining unit employee were discharged on account of his race, he would be able to bring suit pursuant to Title VII to remedy that wrong. Indeed, the decision below found that Petitioners stated a claim for relief when they alleged that the Company had engaged in race discrimination in refusing to hire blacks into more favorable positions outside the bargaining unit. The Eleventh Circuit remanded a portion of this case to the district court for the specific purpose of giving the Petitioners an opportunity to prove this claim. Petition at A-12 to A-13.

One of the several sensible bases underlying the Eleventh Circuit's rejection of Petitioners' claim was its recognition that "because of their unique status in the workplace, bargaining unit employees are *never* similarly situated with non-bargaining unit employees." Petition at A-9 (emphasis in original). Although Section 158(a)(5) requires an employer to bargain about the effects of its decision to close its plant when there is a group of bargaining unit employees represented by a union, no corresponding obligation exists with respect to non-bargaining unit personnel. For this reason, as the Eleventh Circuit correctly noted, the Petitioners are not similarly situated with the non-bargaining unit employees who received severance pay. Petition at A-9 to A-10. The Eleventh Circuit hit the mark when it noted that Petitioners ask the courts "to recognize a theory of relief heretofore unrecognized in Title VII jurisprudence." Petition at A-8. Under this theory, Petitioners claim they are entitled to relief "based upon the contention that non-minority, [non-bargaining unit] employees were being treated differently from minority, [bargaining unit] employees." Petition at A-9.

An obvious difference between these two groups of employees is that Section 158(a)(5) applies to the employer's dealings with the latter, but not the former. Therefore, while no NLRA violation would occur if an employer unilaterally bestowed severance pay benefits on non-bargaining unit employees, the same employment action with respect to bargaining unit employees would unquestionably be an unfair labor practice. The ruling of the court below in no way bars bargaining unit members from maintaining a Title VII action when they are similarly

situated with non-bargaining unit members. A prime example of this is the fact that the Eleventh Circuit remanded the case in part to allow Petitioners an opportunity to attempt to prove a Title VII violation based on a refusal to hire theory. Petition at A-13. The two groups of employees would obviously be similarly situated at the time they were applicants seeking employment with the company.

Moreover, the employer is also required, in dealing with a bargaining unit representative in such a situation, to notify the union of its decision and thus give the union a meaningful opportunity to bargain about the effects of the decision if it so requests. If bargaining takes place, the employer must do so in good faith. There is no similar requirement placed upon employers in their dealings with non-bargaining unit personnel. This rule applies only to an employer's dealings with bargaining unit personnel and, therefore, supports the proposition that the two groups are not similarly situated under these facts.

Petitioners' concern that this decision has broad application is belied by their inability to point to any other case decided in the quarter century since the passage of the Civil Rights Act where an identical clash between Title VII and the NLRA has occurred. In the only case even factually close to the instant one, the Seventh Circuit has ruled, consistent with the court below, that a plaintiff fails to state a claim when she challenges an employer's failure to act when that action would constitute a violation of a nondiscriminatory collective bargaining agreement. *Rose*, 487 F.2d at 810. Yet there are numerous cases where plaintiffs, who are members of bargaining units, bring actions under Title VII.

Thus, contrary to Petitioners' disingenuous misrepresentations, it is clear that the court of appeals' ruling will in the future bar one type of claim and one type only: an employee cannot sue an employer under Title VII for that employer's failure to perform an act the performance of which would have been unlawful pursuant to Section 158(a)(5) and where the employee has failed to allege that he is subject to a contract discriminatory on its face or in its administration or that discrimination was a factor in the negotiation process between the employer and union. This ruling, eminently correct as it is, will apply only in a small number of cases. More importantly, its application will further the result intended by Congress in enacting Section 158(a)(5), in that employers will remain unable to provide directly severance pay benefits to bargaining unit members without the participation of a bargaining representative.[13]

III. The Eleventh Circuit's Decision Below Is Not In Conflict With Any Decision Of This Court Or Any Court of Appeals.

The Petitioners claim that the decision below conflicts with rulings of other circuits cited in footnote 2 of their Petition. An examination of the cases cited by Petitioners in footnote 2 demonstrates that not a single

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[13] For similar reasons, Petitioners fail to state a claim under a disparate impact theory. Since Western Grain could not lawfully have unilaterally bestowed severance pay benefits upon the bargaining unit employees, its failure to do so, even if it disproportionately impacted on a protected class, is not a violation of Title VII. Moreover, even assuming *arguendo* that it was actionable, what more compelling "business necessity" could be shown than compliance with a mandate of Congress in the form of Section 158(a)(5)?

decision is even factually similar to the case *sub judice*, much less in conflict with it.

For the Court's convenience, these cases relied upon by Petitioners in footnote 2 are summarized parenthetically as follows: *Leone v. Mobile Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975) (relying on *Gardner-Denver* and ruling that employees are not required to exhaust initially grievance procedures under a contract before bringing suit under Fair Labor Standards Act and the Occupational Safety and Health Act); *Baldracchi v. Pratt & Whitney Aircraft Division*, 814 F.2d 102, 105 (2d Cir. 1987) (Section 301 of the Labor Management Relations Act does not preempt an action by a union member under a state statute that prohibits an employee's discharge for filing a worker's compensation claim), *cert. denied*, 108 S.Ct. 2819 (1988); *Consolidated Coal Co. v. Marshall*, 663 F.2d 1211, 1219 (3d Cir. 1982) (arbitrator's findings regarding whether employee was warranted in leaving job due to machine noise were not binding on administrative law judge or the Federal Mine Safety and Health Commission in suit brought under the Federal Mine Safety and Health Act of 1977); *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 857-58 (5th Cir. 1975) ("the rights conferred by Title VII [do not] constitute a proper subject of collective bargaining, [and an employer may not] approach an employee directly in an effort to obtain a prospective waiver 'as part of an economic bargain' with a union or, by extension, with the employee even if there is no union"); *Lyght v. Ford Motor Co.*, 645 F.2d 435, 438 (6th Cir. 1981) (citing *Gardner-Denver* for proposition that the doctrines of res judicata, collateral estoppel and

election of remedies normally do not apply in Title VII actions); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 426 (7th Cir. 1986) (plaintiff not required to exhaust contractual administrative remedies before bringing actions under Title VI, Title VII and § 1981); *Marshall v. N.L. Industries, Inc.*, 618 F.2d 1220, 1222 (7th Cir. 1980) (arbitration award ordering discharged employees' reinstatement without backpay did not bar relief sought by Secretary of Labor pursuant to Occupational Safety and Health Act); *Wilmington v. J. I. Case Co.*, 793 F.2d 909, 918 (8th Cir. 1986) (arbitral award did not foreclose plaintiff's § 1981 action); *Robbins v. Prosser's Moving and Storage Co.*, 700 F.2d 433 (8th Cir.) (national pension policy embodied in the Labor Management Relations Act, the Employee Retirement Income Security Act and the Multiemployer Pension Plan Amendments Act, together with the terms of a union agreement and accompanying trust instruments, dictate that trustees not be bound by an arbitration procedure which they have no right to initiate), *aff'd*, 466 U.S. 364 (1984); *Gibson v. Local 40, Supercargos & Checkers*, 543 F.2d 1259, 1266 n.14 (9th Cir. 1976) (exhaustion of contractual rights under collective bargaining agreement is not a condition precedent to bringing a Title VII action); *Peabody Galion v. Dollar*, 666 F.2d 1309, 1320-22 (10th Cir. 1981) (arbitrator's decision rendered pursuant to arbitration clause in collective bargaining agreement does not bar diversity action brought for wrongful termination under Oklahoma law).

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

David J. Middlebrooks
2222 Arlington Avenue South
Birmingham, Alabama 35205
(205) 933-7111